



Case Western Reserve Law Review

Volume 62 | Issue 4

2012

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Recommended Citation

Daniel Tokaji and Owen Wolfe, *Baker, Bush, and Ballot Boards: The Federalization of Election Administration*, 62 Case W. Res. L. Rev. 969 (2012)

Available at: <https://scholarlycommons.law.case.edu/caselrev/vol62/iss4/5>

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BAKER, BUSH, AND BALLOT BOARDS: THE FEDERALIZATION OF ELECTION ADMINISTRATION

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INTRODUCTION

“We conclude that the complaint’s allegations of a denial of equal protection present a justiciable constitutional cause of action The right asserted is within the reach of judicial protection under the Fourteenth Amendment.”¹ So wrote Justice William Brennan in *Baker v. Carr*, a case that heralded a new era in the U.S. Supreme Court’s election law jurisprudence. There are many dimensions to *Baker*. The most obvious is the lifting of the barrier on judicial involvement in redistricting through its redefinition of the political question doctrine.² This set the stage for extensive federal judicial intervention in the process of drawing districts, first through *Reynolds*

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¹ *Baker v. Carr*, 369 U.S. 186, 237 (1962).

² *Id.* at 217 (adopting a six-part test for ascertaining whether a nonjusticiable political question exists). For commentary on *Baker*’s redefinition of the doctrine, to allow the Court to hear a wider range of claims, see Lynn A. Baker & Ernest A. Young, *Federalism and the Double Standard of Judicial Review*, 51 DUKE L.J. 75, 103–5 (2001); Robert J. Pushaw, Jr., *Judicial Review and the Political Question Doctrine: Reviving the Federalist “Rebuttable Presumption” Analysis*, 80 N.C. L. REV. 1165, 1177 (2002); Michael R. Kelly, Note, *Revisiting and Revising the Political Question Doctrine: Lane v. Haliburton and the Need to Adopt a Case-Specific Political Question Analysis for Private Military Contractor Cases*, 29 MISS. C. L. REV. 219, 229–30 (2010).

*v. Sims*³ and the other “one person, one vote” cases, and ultimately through enactment and judicial application of the Voting Rights Act of 1965 (“VRA”).⁴ We might call this series of developments the “federalization of redistricting.”

Important as *Baker*’s ramifications for the drawing of legislative districts were, they are not our primary focus here. This Article will instead address the broader impact of *Baker v. Carr* in making the federal courts important players in the electoral process. Our specific focus is on the federal judiciary’s increasingly important role in election administration. By election administration, we mean the set of electoral practices—from voting machines, to voter ID, to provisional ballots, to voter registration—that were mostly ignored by the general public and most scholars before 2000, but have since become hugely important in both realms. Until 2000, election administration was almost exclusively a matter of state law and local practice, with a very limited federal overlay. While election administration is still *mostly* a matter of state law and local practice, the federal government—especially its courts—plays a more significant role today than was the case in the last century.

Several related developments account for this increased federal presence in election administration: (1) more federal litigation, including claims arising under the U.S. Constitution and (2) greater public attention to this set of issues, which led to (3) enactment of the Help America Vote Act of 2002 (“HAVA”),⁵ the most comprehensive (if not most significant)⁶ federal intervention in election administration in American history, which in turn led to (4) more

³ 377 U.S. 533 (1964).

⁴ Pub. L. No. 89–110, 79 Stat. 437 (codified as amended at 42 U.S.C. §§ 1973–1973aa–6 (2006)); see also Allison H. Eid, *A Spotlight on Structure*, 72 U. COLO. L. REV. 911, 918 (2001) (noting how some of the *Baker-Reynolds* doctrine created the “backbone” of the VRA).

⁵ Pub. L. 107–252, 116 Stat. 1666 (2002) (codified at 42 U.S.C. §§ 15301–15545). For more on HAVA, see Daniel P. Tokaji, *Early Returns on Election Reform: Discretion, Disenfranchisement, and the Help America Vote Act*, 73 GEO. WASH. L. REV. 1206, 1214–20 (2005) (describing in detail the provisions of HAVA).

⁶ We say “most comprehensive” because it touched on so many aspects of election administration, including voting technology, voter registration, provisional voting, voter identification, poll workers, and the standards for counting votes. The award for “most significant” must go to the VRA. See Jocelyn Friedrichs Benson, *Election Fraud and the Initiative Process: A Study of the 2006 Michigan Civil Rights Initiative*, 34 FORDHAM URB. L.J. 889, 931 (2007) (referring to the VRA as “the most significant piece of federal legislation protecting the voting rights of U.S. citizens . . .”); John M. Rosenberg, *Personal Reflections of a Life in Public Interest Law: From the Civil Rights Division of the United States Department of Justice to Appalred*, 96 W. VA. L. REV. 317, 320 (1993) (noting that the VRA is “perhaps the most significant piece of civil rights legislation ever to be passed . . .”). That being said, HAVA is arguably the most significant piece of voting rights legislation since the VRA. See Brian Kim, *Help America Vote Act*, 40 HARV. J. ON LEGIS. 579, 579 (2003) (stating that lawmakers call HAVA the most significant legislation since the VRA).

federal statutory claims in federal court. This is the set of developments that we collectively refer to as the “federalization of election administration.”

To understand the (partial) federalization of American election administration during the past decade, it is necessary to discuss another big case, one that remains a brooding omnipresence hovering over this area of election law: *Bush v. Gore*.⁷ At the risk of hyperbole—and with some caveats—we contend that *Bush* can be seen as the new *Baker*. It set the stage for federal lower court judges to play a much more active role in policing the administration of elections, just as *Baker* did with the redistricting process decades earlier. This is exemplified by the remarkable litigation over an obscure judicial race in southwestern Ohio, which has resulted in published decisions from both federal courts (*Hunter v. Hamilton County Board of Elections*)⁸ and a state court (*Ohio ex rel. Painter v. Brunner*)⁹—as well as a not-too-subtle struggle for power between the federal and state courts. Underlying these cases is an extremely important question concerning the authority of federal courts in overseeing election administration.

We also argue that the increased federal court involvement in election administration is a good thing, given that federal judges are insulated from partisan politics in a manner that American electoral institutions (and for that matter state judges) mostly are not. While other countries have electoral institutions that enjoy some degree of independence from partisan politics, we generally do not—certainly not at the federal level, not at the state level, and mostly not at the local level. Because of the federal courts’ relative insulation from partisan politics, it is desirable that it play an active role in overseeing federal elections. This role is a positive development and one that partially stems from *Baker* as well as *Bush*.

Our argument regarding the partial federalization of election administration proceeds in three parts. Part I revisits *Baker v. Carr*, arguing that the case was really about federalism. What we mean by this is not that it protected state sovereignty, but the opposite: that it took state sovereignty off the table as a justification for the political question doctrine and thereby transferred authority over redistricting from state legislatures to federal courts. Part II suggests that *Bush* has played a comparable—though not identical—role with respect to election administration, resulting in a more active role for the federal

⁷ 531 U.S. 98 (2000).

⁸ No. 1:10CV820, 2010 WL 4878957 (S.D. Ohio Nov. 22, 2010).

⁹ 941 N.E.2d 782 (Ohio 2011).

judiciary in this realm. Part III argues that this is a good thing, notwithstanding the tension it has created between the federal and state courts, exemplified in *Hunter*. Federal courts do and should hold the trump card in this nascent conflict, as they are the American institution best-suited to adjudicate election-related disputes.

I. *BAKER V. CARR* AND FEDERALISM

In *Baker*, the Court was presented with a challenge to a legislative apportionment map that had not been altered since 1901, despite significant population growth and demographic changes in the intervening six decades.¹⁰ The majority held that the case was justiciable.¹¹ It devoted a considerable portion of its opinion distinguishing precedent that might be understood to require otherwise.¹² Justices Felix Frankfurter wrote a vigorous dissent, excoriating the majority for allegedly “revers[ing] a uniform course of decision established by a dozen cases . . . [.] a massive repudiation of the experience of our whole past”¹³

Nowadays, we tend to focus on *Baker*’s significance in the judicialization of redistricting—that is, in transferring power from legislators to judges. But an equally important aspect of the case is the *federalization* of redistricting, transferring power from the states to the federal government. Put another way, *Baker* was important as much for what it took away as for what it gave. It took away one of the primary justifications—maybe the primary justification—for the political question doctrine that had existed in prior decades: respect for state sovereignty.¹⁴ This opened the door to federal courts policing the redistricting process, an area that was previously reserved for state legislatures and courts.

To understand this dimension of *Baker*, it is helpful to review its famous list of factors that define political questions:

¹⁰ *Baker v. Carr*, 369 U.S. 186, 191–92 (1962).

¹¹ *Id.* at 237.

¹² *Id.* at 208–37.

¹³ *Id.* at 266–67 (Frankfurter, J., dissenting).

¹⁴ See Pushaw, *supra* note 2, at 1177 (stating that *Baker* cast aside the principle of federalism); see also Patrick M. Garry, *A Different Model for the Right to Privacy: The Political Question Doctrine as a Substitute for Substantive Due Process*, 61 U. MIAMI L. REV. 169, 176 (2006) (discussing *Baker*’s new focus on separation of powers and abandonment of federalism); Thomas C. Berg, Comment, *The Guarantee of Republican Government: Proposals for Judicial Review*, 54 U. CHI. L. REV. 208, 212 (1987) (stating that *Baker* based its decision on federal separation of powers instead of federalism); cf. Anya J. Stein, Note, *The Guarantee Clause in the States: Structural Protections for Minority Rights and Necessary Limits on the Initiative Power*, 37 HASTINGS CONST. L.Q. 343, 349–50 (2010) (noting that the earlier political question doctrine case *Luther v. Borden* rooted the political question doctrine in both separation of powers and federalism).

Prominent on the surface of any case held to involve a political question is found [1] a textually demonstrable constitutional commitment of the issue to a coordinate political department; or [2] a lack of judicially discoverable and manageable standards for resolving it; or [3] the impossibility of deciding without an initial policy determination of a kind clearly for nonjudicial discretion; or [4] the impossibility of a court's undertaking independent resolution without expressing lack of the respect due coordinate branches of government; or [5] an unusual need for unquestioning adherence to a political decision already made; or [6] the potentiality of embarrassment from multifarious pronouncements by various departments on one question.¹⁵

What is missing from the list is respect for state sovereignty. Before *Baker*, avoidance of infringement on state's sovereign prerogatives was one of the principal justifications for federal courts declining to decide a case on political question grounds, as we explain below. But after *Baker*, the political question doctrine is about separation of powers, not federalism.¹⁶

To grasp this change, it is helpful to compare *Baker* to *Luther v. Borden*.¹⁷ *Luther* arose out of the Dorr Rebellion.¹⁸ The conflict began when a constitutional convention was convened in Rhode Island and purportedly created a new state government, while the old government—still operating under the rules of a pre-revolutionary, “unrepublican” English charter—declared martial law

¹⁵ *Baker*, 369 U.S. at 217.

¹⁶ See Robert J. Pushaw, Jr., *The Presidential Election Dispute, the Political Question Doctrine, and the Fourteenth Amendment: A Reply to Professors Krent and Shane*, 29 FLA. ST. U. L. REV. 603, 613–614 n.65 (2001) (stating that *Baker* made an “unprecedented assertion that the political question doctrine concerned only separation of powers, not federalism . . .”); Martin H. Redish & Karen L. Drizin, *Constitutional Federalism and Judicial Review: The Role of Textual Analysis*, 62 N.Y.U. L. REV. 1, 36 (1987) (discussing judicial abstention in the area of federalism); Sara Thompson, *Recent Decisions of the United States Court of Appeals for the District of Columbia Circuit: Constitutional Law*, 74 GEO. WASH. L. REV. 676, 706–7 (2006) (stating that “the political question doctrine is grounded in separation of powers”); Ernest A. Young, *Making Federalism Doctrine: Fidelity, Institutional Competence, and Compensating Adjustments*, 46 WM. AND MARY L. REV. 1733, 1824–26 (2005) (discussing the fact that there has been no significant effort to determine the Court's jurisdiction over federalism questions since *Baker*); Edward A. Stelzer, Note, *Bearing the Judicial Mantle: State Court Enforcement of the Guarantee Clause*, 68 N.Y.U. L. REV. 870, 870 (1993) (discussing the nonjusticiability of the guarantee clause);

¹⁷ 48 U.S. 1 (1849).

¹⁸ See generally MARVIN E. GETTLEMAN, *THE DORR REBELLION: A STUDY IN AMERICAN RADICALISM 1833–1849* (1973) (a study of the Dorr Rebellion).

to maintain power.¹⁹ Plaintiffs wanted the Court to decide which of two rival governments in Rhode Island was the legitimate one.²⁰ As Chief Justice Roger Taney put it at the start of his opinion for the Court, with no small amount of understatement, the case arose “out of the unfortunate political differences which agitated the people of Rhode Island in 1841 and 1842.”²¹ The specific event precipitating *Luther* was the breaking and entering the home of Martin Luther, a leader of the new constitutional government (which had extended voting rights to all men over twenty-one who had resided in the state for one year),²² by Luther Borden and other officials of the old charter government (which had limited voting to freeholders).²³ Luther brought a trespass claim against the old government’s officials, arguing that the trespass was illegal because the old government was unlawful under the Republican Guarantee Clause of the U.S. Constitution.²⁴ Plaintiff thus sought to use the arrest as a vehicle for obtaining a judicial determination of which government was the legitimate one. The Court refused to take the bait, declaring the case nonjusticiable.

What is most significant about *Luther*, for our purposes, is *why* the Court refused to take the bait. Contrary to what one might think from reading *Baker*’s description of *Luther*, the Court’s rationale was not only, or even mainly, about separation of powers.²⁵ It was, instead, grounded in federalism. Chief Justice Taney’s opinion mentions the fact that “the political department has always determined whether the proposed constitution . . . was ratified or not by the people of the State, and the judicial power has followed its decision.”²⁶ But read in context, it is clear that the opinion is referring to the political department *of the state*, not the federal government. Chief Justice Taney’s opinion proceeds to explain that, in Rhode Island, the authority of the old government had been questioned in the course of

¹⁹ *Luther*, 48 U.S. at 3–9.

²⁰ *Id.* at 1.

²¹ *Id.* at 34.

²² *Id.* at 10–12.

²³ *See id.* at 6 (referring to the eligible voters as “freemen”).

²⁴ *See id.* at 1–2; U.S. CONST. art. IV § 4 (“The United States shall guarantee to every State in this Union a Republican Form of Government . . .”).

²⁵ *See Baker v. Carr*, 369 U.S. 189, 218–22 (1962). Justice Brennan wrote that the *Luther* court’s decision that the case was nonjusticiable was based on “several factors:” “the commitment to the other branches of the decision as to which is the lawful state government; the unambiguous action by the President, in recognizing the charter government as the lawful authority; the need for finality in the executive’s decision; and the lack of criteria by which a court could determine which form of government was republican.” *Id.* at 222. Notice that Justice Brennan did not include respect for state sovereignty as factor in that list, a clear—and perhaps deliberate—misreading of *Luther*.

²⁶ *Luther*, 48 U.S. at 39.

criminal prosecutions of its opponents (including Dorr himself), but the state courts concluded that “it rested with the political power to decide whether the charter government had been displaced” and that “according to the laws and institutions of Rhode Island, no such change had been recognized.”²⁷ In other words, it was up to the “political department” of the state’s government to determine whether that government had been displaced.²⁸ The Rhode Island state court had recognized this, and the U.S. Supreme Court emphasized “that the courts of the United States adopt and follow the decisions of the State courts in questions which concern merely the constitution and laws of the State.”²⁹

While the Constitution vests federal courts with power to decide some disputes, the *Luther* Court stressed that “the power of determining that a State government has been lawfully established . . . is not one of them.”³⁰ Such a determination, *Luther* said, belongs to the states.³¹ Put simply, the U.S. Supreme Court deferred to the state court, which, in turn, deferred to the political department of state government on the pivotal question of whether that government was lawfully established.

The question of which government was lawfully established was not the only one best left to the state, in the Court’s view. As another example, the Court noted that it “certainly . . . is no part of the judicial functions of any court of the United States to prescribe the qualification of voters in a State . . . nor has it the right to determine what political privileges the citizens of a State are entitled to”³² Therefore, the Court rhetorically asked, even if a federal court had tried to take on this inquiry, “by what rule could it have determined” the legitimacy of the dueling Rhode Island governments?³³ To put it into modern parlance, the Court suggested that respect for state power is what precluded the federal courts from articulating a judicially manageable standard under which the case could be decided.

²⁷ *Id.*

²⁸ The Court reasoned that Rhode Island state courts were necessarily bound to adhere to the determination made by the political department of state government as to which government was legitimate. If the state courts were to inquire into which government was legitimate, and to conclude that the old government was illegitimate, then the power of the state court would necessarily be “annulled with it.” *Id.* at 40. Because the state court’s authority derived from that of the old government, a conclusion that this government was illegitimate would necessarily mean that the state court itself was without power to issue a binding judgment.

²⁹ *Id.*

³⁰ *Id.*

³¹ *Id.*

³² *Id.* at 41.

³³ *See id.* (questioning how the circuit court could have come to its determination without a state law).

After going on for several pages to this effect, the Court emphatically rejects *Luther*'s invitation to second-guess state courts' judgments on the proper government by stating: "The authority and security of the State governments do not rest on such unstable foundations."³⁴ Only then do we get to a "[m]oreover," at which point the Court launches into its discussion of separation of powers—specifically its conclusion that Congress, and not the federal courts, have the power to determine which state government to recognize under the U.S. Constitution.³⁵ We thus recognize that *Luther* is partly rooted in separation of powers. Our point is that *Luther*'s primary rationale was founded in federalism, while separation of powers was secondary. As Anya Stein has argued, the *Luther* Court's "emphasis on federalism" rather than separation of powers in the first part of the opinion was because the case was "centrally concerned [with] political sovereignty," specifically the authority of Rhode Island to govern itself.³⁶

As originally written, then, *Luther* was mostly about federalism, not separation of powers. Professor Robert Pushaw has cited nine other political question opinions after *Luther* (not counting the per curiam opinions that followed *Colegrove v. Green*)³⁷ grounded in federalism.³⁸ Included in these cases are instances of the Court declining to hear claims where the plaintiffs had argued "that states had rendered their governments 'unrepublican' by (1) passing certain laws by initiative rather than statute; (2) delegating legislative power to executive agencies or courts; (3) enacting worker's compensation laws; (4) permitting a rule that statutes could be invalidated only if every state court justice (or all but one) agreed; and (5) amending the state constitution through certain procedures."³⁹

³⁴ *Id.* at 42.

³⁵ See *id.* (discussing how the Constitution treats these issues as political in nature and allows the "general government" to interfere with state concerns).

³⁶ Stein, *supra* note 14, at 350 (noting that the *Luther* Court left the possibility that state courts could be the venue to hear Guaranty Clause challenges).

³⁷ 328 U.S. 549 (1946).

³⁸ Pushaw, *supra* note 2, at 1177 n.72.

³⁹ *Id.* at 1169. Robert Post has examined one of the precedents noted by Professor Pushaw, *Massachusetts v. Mellon*, 262 U.S. 447 (1923), a case that "crafted [a] political question doctrin[e] that . . . essentially precluded judicial oversight of the federalism implications of the national spending power." Robert Post, *Federalism in the Taft Court Era: Can It Be "Revived"?*, 51 DUKE L.J. 1513, 1546 (2002). In that case, plaintiffs challenged a federal law that would give grants to states that met particular criteria. *Id.* at 1545. The grants would be used to improve health care for mothers and infants. *Id.* The plaintiffs argued that the grants involved local issues and that the conditional nature of these grants would force states to "yield a portion of their sovereign rights." *Id.* at 1546 (quoting *Mellon*, 262 U.S. at 479). The court declined to hear these arguments, a decision based in part on the political question doctrine. See *id.* (discussing how the court's crafting of the political question doctrine prevents judicial review of the federalism problems of national spending).

The *Baker* Court recharacterized this line of cases as concerned with separation-of-powers rather than federalism. It conspicuously omitted respect for state sovereignty from the list of the factors that *Luther* thought made a question nonjusticiable. Instead, Justice Brennan's opinion for the majority asserted that the only factors motivating the Court in *Luther* were respect for Congress, respect for the President, and the lack of judicially manageable standards for resolving the dispute.⁴⁰ In so doing, *Baker* engaged in more than a little sleight of hand. An honest reading of *Luther* and its progeny reveals that federalism was an important part of the political question doctrine. This mischaracterization of precedent led Justice Frankfurter to accuse the majority of repudiating history.⁴¹ Hyperbolic though these accusations were, there was more than a kernel of truth in them.

To clarify, our point is not that *Baker* was wrong to do what it did. In fact, we think that the federal courts intervention that followed *Baker* was a very healthy thing. State legislators in places like Tennessee and Alabama had no incentive to redraw state lines, notwithstanding the enormous population shifts that had occurred, because those state legislators benefitted from malapportioned districts. Whatever state sovereignty interests existed, there was a strong imperative for federal judicial intervention. This problem was not going to fix itself. Thus, our argument is not that *Baker* was wrong to define the political question doctrine, but that it *did* redefine the doctrine. By taking respect for state sovereignty off the table as a justification for application of the political question doctrine, *Baker* did more than clarify the law; it changed it.⁴² And that change has

⁴⁰ See *supra* note 25.

⁴¹ See *supra* note 13 and accompanying text.

⁴² A few commentators, most notably Stephen Gottlieb, have argued that federalism should be re-incorporated into the political question doctrine. Stephen E. Gottlieb, *What Federalism & Why? Science Versus Doctrine*, 35 PEPP. L. REV. 47, 72 (2007) (asserting that, if the Supreme Court truly wanted to adhere to the original compromise struck in the Constitution, "[f]ederalism should be a prime instance of the political question doctrine that tells courts to keep out."). Interestingly, most of the scholarship on this aspect of the political question doctrine seems aimed at reducing state sovereignty by preventing the courts from protecting states from Congress, rather than protecting state sovereignty as *Luther* did. See, e.g., Gene R. Nichol, Jr., *Rethinking Standing*, 72 CAL. L. REV. 68, 101 (1984) (arguing that the political question doctrine "should . . . be given more teeth" by expanding it "to include federalism analysis."); Girardeau A. Spann, *Proposition 209*, 47 DUKE L.J. 187, 189 (1997) (discussing how the Constitution informs social policy concerns); Mark Tushnet, *Why the Supreme Court Overruled National League of Cities*, 47 VAND. L. REV. 1623, 1635–36 (1994) (noting that courts do not necessarily need to enforce federalism if the states have adequate protection through the political process, thus rendering federalism issues nonjusticiable). Justice David Souter advocated this position as well in his dissent in *U.S. v. Morrison*. See *U.S. v. Morrison*, 529 U.S. 598, 647–48 (2000) (Souter, J., dissenting) ("The objection to reviving traditional state spheres of action as a consideration in commerce analysis . . . only rests on the portent of incoherence . . ."); see also Robert J. Delahunty, *Federalism Beyond the Water's Edge: State*

endured. To this day, the political question doctrine is focused on separation of powers, not federalism.⁴³

We are not the first commentators to note that *Baker* changed the law by taking federalism off the table as a justification for the political question doctrine.⁴⁴ What is interesting is that, while many have noted this aspect of *Baker*, most do not dwell on it—other than to observe that federalism is missing from *Baker*’s test for what counts as a political question.⁴⁵ The scholarship on this aspect of *Baker* is limited.⁴⁶ But the partisan transfer of power over districting from the states to the federal level is one of the most important aspects of *Baker*’s legacy. In Part II, we explain how a similar transfer has occurred in the area of election administration since *Bush v. Gore*.

II. *BUSH*, THE NEW *BAKER*

By taking respect for state sovereignty off the table as a justification for the political question doctrine, *Baker v. Carr* set the stage for the federal judiciary’s more active involvement in the

Procurement Sanctions and Foreign Affairs, 37 STAN. J. INT’L L. 1, 71 (2001) (noting Justice Souter’s position). Justice Souter relied on a passage written by James Madison in Federalist No. 46, arguing that federal judicial review is unnecessary in the context of state sovereignty and federalism, because “[t]he National Government ‘will partake sufficiently of the spirit [of the States], to be disinclined to invade the rights of the individual States, or the prerogatives of their governments.’” *Morrison*, 529 U.S. at 648 (Souter, J., dissenting) (citation omitted) (second set of brackets in original).

⁴³ See, e.g., Mark Tushnet, *Policy Distortion and Democratic Deliberation: Comparative Illumination of the Countermajoritarian Difficulty*, 94 MICH. L. REV. 245, 256–57 (1995) (noting the idea that political pressures on Congress might justify courts declining to hear federalism disputes as nonjusticiable, while also noting that this is not the Court’s current position on the issue).

⁴⁴ See, e.g., Graham O’Donoghue, *Precatory Executive Statements and Permissible Judicial Responses in the Context of Holocaust-Claims Litigation*, 106 COLUM. L. REV. 1119, 1157 (2006) (noting that the political question doctrine is an “abstention doctrine”); Baker & Young, *supra* note 2, at 103–05 (“To be sure, the political question doctrine has long stood for the proposition that some constitutional issues are nonjusticiable despite the fact that they fall within the jurisdiction of the federal courts.”); Thompson, *supra* note 16, at 706–07 (discussing how the court uses this doctrine “to avoid political questions”); Redish & Drizin, *supra* note 16, at 36 (noting that the number of cases affected by the federal question doctrine would be greatly increased if federalism issues increase); Young, *supra* note 16, at 1824–26 (discussing the effects of *Baker* on the political question doctrine); Susan Randall, *Sovereign Immunity and the Uses of History*, 81 NEB. L. REV. 1, 105–06 n.494 (2002) (“[F]ederalism concerns may encompass doctrines like the political question doctrine, even if that doctrine is not specifically applicable to federal-state relations.”).

⁴⁵ See, e.g., Kristin Feeley, Comment, *Guaranteeing a Federally Elected President*, 103 NW. U. L. REV. 1427, 1454–57 (2009) (discussing how certain aspects of federalism might be justiciable); Baker & Young, *supra* note 2, at 105 (discussing when the court refuses to enforce federalism constraints).

⁴⁶ A notable exception is the scholarship of Professor Pushaw, *supra* note 2, at 1177.

process of drawing legislative districts—first through the one person, one vote rule, later through its interpretation and enforcement of the VRA. Again, this is not the story we want to retell here. Instead, we focus on the story of how something similar has happened in the realm of election administration in the last ten years. Just as we can divide redistricting into the pre-*Baker* and post-*Baker* eras, we can divide election administration into the pre-*Bush* and post-*Bush* eras. In each “pre” era, the election law issue was left to the states. In the “post” eras, there is a substantial federal footprint on the issue—and, specifically, active judicial superintendence of redistricting and election administration, respectively.⁴⁷

What accounts for the larger federal footprint in election administration in the post-*Bush* era? It is not that issues like voting equipment, voter ID, and voter registration were considered nonjusticiable political questions. The Constitution does not textually commit the resolution of these questions to the political branches, and the Equal Protection Clause furnishes a judicially manageable standard, if not a bright-line rule.⁴⁸ The reason that questions of election administration did not occupy much of the federal courts’ time and attention before *Bush* is that virtually no one considered the possibility of constitutional challenges to practices like the counting of hanging-chad ballots, the use of unreliable voting equipment, or the disparate treatment of provisional and absentee ballots.

Bush can be understood as the new *Baker*, in the sense that it opened the federal courts to election administration litigation, just as its predecessor opened the federal courts to districting litigation. So as to avoid any misunderstanding, let us first state two qualifications to this claim. First, we are not talking about citation counts. *Baker* has been cited many times by the Supreme Court and the lower courts in

⁴⁷ See *id.* (noting the tremendous impact that *Baker* has had on the ability of federal courts to hear election law disputes).

⁴⁸ Erwin Chemerinsky, has suggested that *Bush* involved a political question. Erwin Chemerinsky, *Bush v. Gore Was Not Justiciable*, 76 NOTRE DAME L. REV. 1093, 1094 (2001). Shortly after the case was decided, he argued that the U.S. Supreme Court should have remanded to the Florida Supreme Court, saying “an analogy can be drawn to the political question doctrine.” *Id.* at 1111. We do not agree. As we have explained, the political question doctrine is about separation of powers, not federalism, after *Baker*. Respect for state sovereignty, including state courts power to decide issues of state law, therefore is not a reason to hold a case nonjusticiable on political question grounds. Erwin Chemerinsky has also suggested an argument based upon the *Baker* factors. *Id.* at 1107. The only clear textual commitment to a coordinate branch, however, is Congress’ duty to count the Electoral College votes, which was not implicated by the Court’s conclusion that Florida’s system for recounting citizens’ votes violated equal protection. Nor was there a lack of judicially manageable standards. As explained in Part III, we think the Equal Protection Clause provides a sufficient standard, which was applied in cases before *Bush* as well as in cases that have followed it.

subsequent years.⁴⁹ By contrast, the Supreme Court has been exceedingly reluctant to cite *Bush v. Gore*, and there are not a huge number of lower court cases that have cited the case either.⁵⁰ Second, we are not talking about the intent of the Supreme Court, which was quite different in these two sets of cases. The *Baker* Court was quite conscious of the fact that it was opening the door, if not the floodgates, to litigation over legislative districts.⁵¹ The *Bush* Court, by contrast, seemed intent on shutting the door behind it, by limiting the principle upon which it sought to rely. This is most clearly evident in the Court's statement that:

Our consideration is limited to the present circumstances, for the problem of equal protection in election processes generally presents many complexities.

The question before the Court is not whether local entities, in the exercise of their expertise, may develop different systems for implementing elections.⁵²

Some commentators have criticized these sentences for being unprincipled, in the sense of declaring a rule of law good for one day only.⁵³ We disagree. What the Court did instead was to (1) assert an equal protection principle established by cases like *Baker* and *Reynolds*, variously characterized as "equal weight" to each vote and "equal dignity" to each voter and as valuing one person's vote over

⁴⁹ A Lexis *Shepard's* report states that the case has been cited in 4251 decisions. Shepard's® Report for Baker v. Carr, <https://advance.lexis.com/RedirectToShepards?requestid=8f77dc63-1ea0-4bd8-ac93-bb733f86fab6> (follow the "Shepard's®" link on the Lexis®Advance opening page and search "369 U.S. 186").

⁵⁰ The *Shepard's* report for *Bush* reveals that it has been cited in 269 decisions, though not at all by the U.S. Supreme Court. Shepard's® Report for *Bush v. Gore*, <https://advance.lexis.com/Shepards/shepards/tab?requestid=98968e1c-33fe-45ad-b405-5ef6183267d1&ContentId=tag%3alexisnexus.com%3ashepards%2f26b8e49d24024d6193097f4349959ab9> (follow the "Shepard's®" link on the Lexis®Advance opening page and search "531 U.S. 98"); see also *infra* note 66 and accompanying text (listing cases the Court cited to in *Bush* for examples of the equal protection clause).

⁵¹ See, e.g., *Baker v. Carr*, 369 U.S. 189, 250 n.5 (1962) (Douglas, J., concurring) (citing with approval a state court opinion arguing that when "by reason of passage of time and changing conditions the reapportionment statute no longer serves its original purpose of securing to the voter the full constitutional value of his franchise, and the legislative branch fails to take appropriate restorative action, *the doors of the courts must be open to him*." (citation omitted) (emphasis added)).

⁵² *Bush v. Gore*, 531 U.S. 98, 109 (2000) (per curiam).

⁵³ See Daniel H. Lowenstein, *The Meaning of Bush v. Gore*, 68 OHIO ST. L.J. 1007, 1016–17 (2007) (listing a number of commentators who have espoused this view, including Steven J. Mulroy, Cass R. Sunstein, and Richard Hasen). In deciding a disputed election for a U.S. Senate seat in 2008, the Minnesota Supreme Court appears to have essentially adopted this view of *Bush* as well. See *Coleman v. Franken*, 767 N.W.2d 453, 465–66 (Minn. 2009) (relying in part on the limiting language quoted above to determine that *Bush* did not apply to that case).

another by “arbitrary and disparate treatment”;⁵⁴ (2) apply this principle to a new context, namely the recounting of punch card ballots in the State of Florida;⁵⁵ and (3) conclude that this process contravened this basic equal protection principle, without clearly specifying its precise boundaries.⁵⁶ In other words, the Court applied an established principle to a new area of law without specifying the precise legal test or how it will apply to future cases.⁵⁷ The wording may be different, but the mode of analysis is not that unusual.

In this respect, *Bush* bears comparison to what the Court did when it decided *Baker* and later *Reynolds*. The Court was certainly aware that it was entering the political thicket in *Baker*.⁵⁸ It may have had a general rule of law in mind, but it did not specify its precise boundaries. And while *Reynolds* (like *Bush*) relies on a vaguely stated principle of law, variously defined as “one person, one vote”⁵⁹ and an “equally effective voice in the election of members of [the] state legislature,”⁶⁰ it too does not define the exact boundaries of this principle.

The Court in *Reynolds* was aware that it was entering a new area without precisely specifying the bounds of the new equal protection rule it articulated. This is evident in Chief Justice Earl Warren’s notes on the case. These notes, in the Chief’s handwriting, include thirty-four numbered, single sentence points on seven sheets of paper.⁶¹ The first reads: “There can be no formula for determining whether equal protection has been afforded.”⁶² Another note, number twenty, reads: “Cannot set out all possibilities in any given case.”⁶³ In other words, the Court that decided *Baker* and *Reynolds*—like the Court that decided *Bush*—rested on a somewhat imprecisely stated principle, allowing for refinement in future cases presenting different facts.

⁵⁴ *Bush*, 531 U.S. at 104.

⁵⁵ *Id.* at 105–06.

⁵⁶ *Id.* at 110.

⁵⁷ For a relatively recent example of this, see, for example, *Snyder v. Phelps*, 131 S.Ct. 1207, 1220 (2011) (“Our holding today is narrow . . . and the reach of our opinion here is limited by the particular facts before us.”).

⁵⁸ *Cf. Colegrove v. Green*, 328 U.S. 549, 556 (1946) (noting that “[c]ourts ought not to enter this political thicket,” i.e. redistricting). The *Baker* Court rejected the appellees’ attempt to rely on *Colegrove*. *Baker v. Carr*, 369 U.S. 186, 202 (1962).

⁵⁹ *Reynolds v. Sims*, 377 U.S. 533, 558 (1964) (quotations and citation omitted).

⁶⁰ *Id.* at 565.

⁶¹ Notes made by Chief Justice Earl Warren on *Reynolds v. Sims* (undated and unpublished handwritten notes) (copies on file with authors). The authors thank Paul Moke of Wilmington College, who is writing a biography of Chief Justice Warren, for graciously providing access to these notes.

⁶² *Id.*

⁶³ *Id.*

This also shows up in Chief Justice Warren's opinion for the *Reynolds* majority, which declines to say exactly how close to numerical equality districts much be:

For the present, we deem it expedient not to attempt to spell out any precise constitutional tests. . . . Developing a body of doctrine on a case-by-case basis appears to us to provide the most satisfactory means of arriving at detailed constitutional requirements in the area of state legislative apportionment.⁶⁴

And later:

We do not consider here the difficult question of the proper remedial devices which federal courts should utilize in state legislative apportionment cases. Remedial techniques in this new and developing area of the law will probably often differ with the circumstances of the challenged apportionment and a variety of local conditions.⁶⁵

The similarity to *Bush*'s language is striking—and given that *Reynolds* is one of just four equal protection cases cited in *Bush*,⁶⁶ one wonders whether it was conscious. The Court stated a broad principle, declined to state precisely the test it was applying, and bracketed other cases presenting different circumstances, reserving them for another day.

Of course, the *Reynolds* Court did provide some clarity in the one person, one vote cases that followed. So far, the current Court has failed to provide comparable clarity for election administration cases since *Bush*. And, in fact, in the most prominent election administration case to have arisen since then, *Crawford v. Marion County Election Board*,⁶⁷ the Court did not cite *Bush* at all. Again, we are not arguing that there is an exact parallel between *Baker* and *Bush*. Our claim is more modest: that there is an important similarity between the two cases in that both set the stage for an increased federal role in their respective realms, redistricting and election administration.

While the Supreme Court has avoided *Bush v. Gore* like the plague—as others have noted, it has become the Voldemort of

⁶⁴ *Reynolds*, 377 U.S. at 578.

⁶⁵ *Id.* at 585.

⁶⁶ See *Bush v. Gore*, 531 U.S. 98, 104–05, 107 (2000) (per curiam) (citing *Reynolds*, as well as *Harper v. Virginia State Bd. of Elections*, 383 U.S. 663 (1966), *Gray v. Sanders*, 372 U.S. 368 (1963) and *Moore v. Ogilvie*, 394 U.S. 814 (1969)).

⁶⁷ 128 S. Ct. 1610 (2008).

Supreme Court cases, “the case that must not be named”⁶⁸—that does not mean the case has been without an impact. Indeed, the Supreme Court’s clear distrust of state institutions in *Bush*⁶⁹ (which is also implicit in *Baker*) has apparently trickled down to the rest of the federal courts, who are now taking a more active role in state election disputes. As Professor Samuel Issacharoff has put it, *Bush v. Gore* declared that “federal courts were open for business when it came to adjudicating election administration claims.”⁷⁰ Lower courts “relaxed rules regarding standing, ripeness, and . . . justiciability”⁷¹ in order to hear more election disputes. They allowed these cases to go to the front of the queue, often deciding them on an expedited basis in the weeks preceding an election. In some areas, like voting technology, election litigation led to changes in how elections are run, even in the absence of a binding decision on the merits.⁷²

Some of the changes are quantifiable. In the years since *Bush*, we have seen a marked increase in federal litigation over the mechanics of election. Richard Hasen has traced this increase in a series of articles, noting that they go from 108 in 1996, to 197 in 2000, to 361 in 2004, and then down slightly to 297 in 2008.⁷³ Most importantly for our purposes, more of this litigation is taking place in federal

⁶⁸ See Chad Flanders, *Please Don't Cite This Case! The Precedential Value of Bush v. Gore*, 116 YALE L.J. POCKET PART 141 (2006) (providing an overview of lower courts’ divided decisions on whether to follow *Bush v. Gore*); Adam Cohen, *Has Bush v. Gore Become the Case That Must Not Be Named?*, N.Y. TIMES, Aug. 15, 2006, at A18 (“The ruling that stopped the Florida recount and handed the presidency to George W. Bush is disappearing down the legal world’s version of the memory hole, the slot where, in George Orwell’s ‘1984,’ government workers disposed of politically inconvenient records.”).

⁶⁹ See Daniel P. Tokaji, *First Amendment Equal Protection: On Discretion, Inequality and Participation*, 101 MICH. L. REV. 2409, 2493–95 (2003) (noting “the Court’s explicit distrust of the county canvassing boards conducting the recounts, and in its implicit but palpable distrust of the Florida Supreme Court”).

⁷⁰ Samuel Issacharoff, *Judging in the Time of the Extraordinary*, 47 Hous. L. REV. 533, 540–41 (2010).

⁷¹ *Id.*

⁷² See, e.g., *Stewart v. Blackwell*, 444 F.3d 843, 846 (6th Cir. 2006) (reinstating litigation challenging “the use of unreliable, deficient” punch card voting equipment “in some Ohio counties but not other counties”); *vacated as moot*, 473 F.3d 692 (6th Cir. 2007) (vacating panel opinion because Ohio abandoned challenged election practices prior to en banc review); *Common Cause v. Jones*, 213 F. Supp. 2d 1106, 1110 (C.D. Cal. 2001) (denying California Secretary of State’s motion for judgment on the pleadings in case challenging the use of punch card voting equipment). For more on this litigation, see Tokaji, *Early Returns*, *supra* note 5, at 1210, 1220–24 (detailing some of this litigation over election technology). See also Advisory from Secretary of State Jennifer Brunner to All County Boards of Elections (July 23, 2009), available at <http://www.sos.state.oh.us/SOS/Text.aspx?page=13670> (last visited Apr. 22, 2012) (discussing how federal litigation led to a settlement agreement that required the Secretary of State to revamp poll worker training statewide).

⁷³ Richard L. Hasen, *The Supreme Court’s Shrinking Election Docket, 2001–2010: A Legacy of Bush v. Gore or Fear of the Roberts Court?* 4 (Apr. 2011) (unpublished draft), available at <http://papers.ssrn.com/abstract=1780508>.

courts. At the start of the last decade, 80 percent of election cases were filed in state court.⁷⁴ By 2008, that number was down to 54 percent.⁷⁵ So *Bush v. Gore* did not just *judicialize* election administration. It also *federalized* election litigation, moving much of it from state to federal courts.

A qualification is in order here. It would be misleading to attribute this rise in litigation entirely to *Bush v. Gore*. It was not just the case itself, but the events that preceded it and those that followed it. Those included the messiness of our election system exemplified by the use of hanging-chad punch card voting systems in Florida and other states, which the Court rightly predicted would lead to legislative reconsideration of how our elections are conducted.⁷⁶ It also included the federal law that was subsequently enacted, the Help America Vote Act of 2002.⁷⁷ While this is not the place for detailed explanation of HAVA's requirements,⁷⁸ suffice it to say that this was the most extensive federal intervention in election administration in U.S. history, imposing requirements for voting technology, voter identification, provisional voting, and voter registration systems.⁷⁹ Since then, we have seen increased legislative activity in the states as well, continuing through the present day. The year 2011 was an especially active year, with a number of states adopting new statutes concerning voter identification, voter registration, and early and absentee voting.⁸⁰

Bush was not the cause—at least the sole cause, of all this activity—any more than *Baker* was the sole cause of the Voting Rights Act and all of the activity surrounding redistricting that followed. What happened before and after *Bush* was also important. Both cases were, however, significant in a way that is impossible to measure, precipitating an increased role for the federal courts in their respective areas. A skeptic might note plaintiffs have lost many of the cases challenging election administration practices in the post-*Bush* era, including:

⁷⁴ Richard L. Hasen, *The Democracy Canon*, 62 STAN L. REV. 69, 91 (2009).

⁷⁵ *Id.*

⁷⁶ *Bush v. Gore*, 531 U.S. 98, 104 (2000) (per curiam) (“After the current counting, it is likely legislative bodies nationwide will examine ways to improve the mechanisms and machinery for voting.”).

⁷⁷ Help America Vote Act of 2002, 42 U.S.C. §§ 15301–15545 (2006).

⁷⁸ For a more detailed account, see Tokaji, *Early Returns*, *supra* note 5.

⁷⁹ *Id.* at 1214–20 (overviewing provisions of the Help Americans Vote Act of 2002).

⁸⁰ For a critical discussion of these laws, see Justin Levitt, *Election Deform: The Pursuit of Unwarranted Electoral Regulation*, 11 ELECTION L.J. 97 (2012).

- Challenges to the refusal to count wrong-precinct provisional ballots in Florida, Michigan, Ohio and other states in 2004.⁸¹
- Challenges to voter identification laws in Georgia and Indiana.⁸²
- Challenges to states' alleged failure to match information in state registration databases against other databases, as required by HAVA, in 2008.⁸³
- Norm Coleman's equal protection challenge to Minnesota's process for counting absentee ballots in 2008.⁸⁴

All this is true, but there have been some significant successes as well, including:

- Challenges to restrictions on registration, including a requirement that voter registration forms be on at least eighty pound paper weight, resolved without litigation in 2004.⁸⁵
- Challenges to intercounty disparities in the application of voter identification requirements in 2006, in Ohio.⁸⁶
- A challenge to an early version of Georgia's voter ID law, which caused amendments making it easier to obtain one free of charge.⁸⁷

The bottom line is that federal courts are now actively policing election administration, in a way that they were not doing before *Bush*

⁸¹ Sandusky Cnty. Democratic Party v. Blackwell, 387 F.3d 565 (6th Cir. 2004) (Ohio); Fla. Democratic Party v. Hood, 342 F. Supp. 2d 1073, 1074–75 (N.D. Fla. 2004); Bay Cnty. Democratic Party v. Land, 347 F. Supp. 2d 404, 410–11 (E.D. Mich. 2004). For more on these cases, see Tokaji, *Early Returns*, *supra* note 5, at 1228.

⁸² Crawford v. Marion Cnty. Election Bd., 128 S. Ct. 1610 (2008); Steve Visser, *Voter ID Law Disputed Again*, ATLANTA JOURNAL-CONST., May 30, 2008, at D6.

⁸³ See, e.g., Ohio *ex rel.* Mahal v. Brunner, No. 2:08-cv-00983, 2008 WL 4647701 (S.D. Ohio Oct. 20, 2008); Alex Brousseau, *Van Hollen Voter Registration Suit to Appear in Court Today*, BADGER HERALD, Sept. 24, 2008, http://badgerherald.com/news/2008/09/24/van_hollen_voter_reg.php; Aaron Gould Sheinin & Julia Malone, *State Responds to Voter ID Challenge*, ATLANTA JOURNAL-CONST., Oct. 15, 2008, at C7.

⁸⁴ Coleman v. Franken, 767 N.W.2d 453 (Minn. 2009).

⁸⁵ See Tokaji, *Early Returns*, *supra* note 5, at 1227–28.

⁸⁶ Ne. Ohio Coal. for the Homeless v. Blackwell, No. C2–06–896, 2006 U.S. Dist. LEXIS 78158 (S.D. Ohio Oct. 26, 2006), *rev'd in part, motion denied by, motion granted by* Ne. Ohio Coal. for the Homeless v. Blackwell, 467 F.3d 999 (6th Cir. 2006).

⁸⁷ See Democratic Party of Georgia, Inc. v. Perdue, 707 S.E.2d 67, 70 (2011) (describing how the Georgia legislature essentially changed the voter ID law so that “the fee charged for a State-approved voter ID card was eliminated” after the original law was challenged in federal court).

v. Gore. And even aside from the important cases in which plaintiffs have prevailed, having a policeman around the corner can make a difference. In a world where partisan election administration is the norm, it is important for those officials to know that federal judges—who enjoy a political independence that state officials, including most state judges lack—are looking over their shoulders.

III. THE FEDERAL-STATE CONFLICT

This brings us to our normative claim: that it is a good thing that we are seeing more election litigation in the federal courts. To understand why, a bit of comparative perspective is helpful. The United States is an outlier among democratic countries, both in its decentralization of election administration and its partisanship in the process. We have not just one system of election administration or even fifty, but thousands—sometimes thousands within a single state.⁸⁸ Moreover, almost all state election authorities and many local election authorities are partisan, in the sense that they are elected or selected based on their partisan affiliations.⁸⁹ The vast majority of state chief election officials are elected as nominees of their parties, and most of the rest are selected by a partisan official.⁹⁰ Things are a bit better at the local level, but not much. Many local election authorities are run by party-affiliated officials.⁹¹

Our system is not the norm among democratic countries. Most now have an independent election commission, insulated from the party or parties that control the central government. Examples include the independent electoral commissions of Australia, Canada, and India.⁹² In other countries (20 percent), the election authority is part of a bureaucracy that enjoys a functional if not formal independence from the government.⁹³ Many of these are in highly regarded democracies like Belgium, Denmark, Sweden and Finland.⁹⁴ Their

⁸⁸ See, e.g., STEVEN F. HUEFNER ET. AL., FROM REGISTRATION TO RECOUNTS REVISITED: DEVELOPMENTS IN THE ELECTION ECOSYSTEMS OF FIVE MIDWESTERN STATES 39 (2011) (noting that Wisconsin has “1,850 autonomous municipal-based elections jurisdictions . . .”).

⁸⁹ See Daniel P. Tokaji, *The Future of Election Reform: From Rules to Institutions*, 28 YALE L. & POL’Y REV. 125, 131–32 (2009) (discussing an overview of partisan affiliations of state election officials).

⁹⁰ *Id.* at 127 (observing as of 2008 that “party affiliated secretaries of state still are the norm” in spite of controversial elections and that “partisanship . . . remain[s]” a “dominant characteristic[] of American election administration”).

⁹¹ *Id.* at 131–32.

⁹² *Id.* at 139 (describing the Australian model); Daniel P. Tokaji, *Public Rights and Private Rights of Action: The Enforcement of Federal Election Laws*, 44 IND. L. REV. 113, 120–21 (2010) (discussing Australia, Canada and India).

⁹³ Tokaji, *The Future of Election Reform*, *supra* note 89, at 139.

⁹⁴ *Id.*

success is probably attributable to having a cadre of professional, career civil servants, giving them substantial insulation from partisan politics.⁹⁵

American election officials generally lack such insulation. So do many state court judges, many of who are selected as nominees of their parties or otherwise have to face an election.⁹⁶ Even if they are not formally party nominees, they have a conflict of interest by virtue of being subject to elections, administered according to rules they will be adjudicating.⁹⁷

Federal judges, to be sure, have their ideological and partisan proclivities.⁹⁸ But Article III provides them a greater level of insulation from partisan politics than that of either election officials or state court judges. The federal courts are, accordingly, the institution best suited to resolve controversies with a strong partisan valence, as election administration cases almost always have.⁹⁹ This is true even of state and local races, because federal courts must ensure that federal constitutional rights are vindicated even in those races with no federal import.

Ohio provides the best example of why federal judicial involvement is so important. During the 2004 election, the state saw a

⁹⁵ *Id.* at 140; Tokaji, *Public Rights*, *supra* note 92, at 121.

⁹⁶ Almost 90 percent of state judges must stand in some form of election; for state courts of last resort, there are nine states that employ partisan elections, while thirteen use nonpartisan elections and eighteen use retention elections. Michael S. Kang and Joanna M. Shepherd, *The Partisan Price of Justice: An Empirical Analysis of Campaign Contributions and Judicial Decisions*, 86 N.Y.U. L. REV. 69, 71, 79 (2011). The other twenty-eight states rely on appointment by partisan actors like the governor or legislature, though twenty-one states require some sort of merit selection. *Id.* at 79. Additionally, six states utilize partisan retention elections, while fourteen use nonpartisan retention elections, eighteen employ retention elections where the judicial candidate runs unopposed but receive a majority of votes and nine states require reappointment by the governor, legislature or a special commission. *Id.* This leaves only three states that provide some sort of life tenure for judge's on the state's court of last resort. *Id.* at n.44 (Massachusetts, New Hampshire, and Rhode Island). Nearly half of states use partisan elections for lower court judges. *Id.* at 79.

⁹⁷ *Cf.* Tokaji, *The Future of Election Reform*, *supra* note 89, at 133 (making a similar point in the context of election officials).

⁹⁸ *See, e.g.*, Michael S. Kang, Book Review, *To Here from Theory in Election Law*, 87 TEX. L. REV. 787, 807 (2009) (noting that federal judges often “appear to fall back on their personal attachments” like political affiliation when deciding cases that are particularly political in nature).

⁹⁹ *See* Daniel P. Tokaji, *Leave It to the Lower Courts: On Judicial Intervention in Election Administration*, 68 OHIO ST. L.J. 1065, 1072 (2007) (discussing “salutary effects” of election administration cases). The “salutary effects” noted by Professor Tokaji include “favorable judgments that protected voting rights . . . [the] advance[ment of] reform . . .” and judicial opinions that have “clarified the rules for voters, parties, and election officials.” *Id.* (footnotes omitted). *Cf.* Note, *Federal Court Involvement in Redistricting Litigation*, 114 HARV. L. REV. 878, 883–890 (2001) (arguing that federal courts are the proper forum for redistricting litigation for the same reason we have articulated in this context: federal courts are more independent and the issues in these cases are highly partisan).

series of disputes over such topics as provisional voting, absentee voting, and voter registration that went before the federal courts, many of them filed against controversial Republican Secretary of State Ken Blackwell.¹⁰⁰ There were also a series of cases in 2008 arising from the tenure of Democratic Secretary of State Jennifer Brunner.¹⁰¹

Most recently, in 2010 and continuing through the present, we have had litigation in both federal and state courts over a familiar topic: whether to count provisional ballots cast in the wrong precinct. The *Hunter/Painter* litigation arose from a very close election for Juvenile Court Judge in Hamilton County between Tracie Hunter (the Democratic candidate) and John Williams (the Republican candidate) and aptly demonstrates a “turf war” between federal courts and state courts made possible by the repudiation of federalism in this context by the *Baker* and *Bush* Courts.

The facts giving rise to *Hunter* are complicated, but we will summarize them as simply as possible. After election day in 2010, the Hamilton County Board of Elections found that Williams had defeated Hunter by twenty-three votes.¹⁰² But after the election, a dispute arose concerning ballots cast at the correct polling location but the wrong precinct—so-called “right church, wrong pew” ballots. Twenty-seven people who had voted in-person absentee ballots were given and cast the ballot for the wrong precinct, but the Board voted to count these ballots because it concluded they were the result of clear poll worker error.¹⁰³ Another 849 people who voted in the wrong precinct but right polling place *on election day* did not have their ballots counted.¹⁰⁴ On November 21, 2010, Hunter filed a federal lawsuit, arguing that the Equal Protection Clause required that those who voted in the wrong precinct on election day have their

¹⁰⁰ Tokaji, *Early Returns*, *supra* note 5, at 1220–39 (discussing the Ohio cases and underlying issues).

¹⁰¹ See, e.g., *Ohio Republican Party v. Brunner*, 582 F. Supp. 2d 957 (S.D. Ohio 2008), *stay denied*, 544 F.3d 711 (6th Cir. 2008), *vacated by, stay granted by* 555 U.S. 5 (2008); *State ex rel. Skaggs v. Brunner*, 588 F. Supp. 2d 828 (S.D. Ohio 2008), *vacated and remanded by* 549 F.3d 468 (6th Cir. 2008), *rehearing in* No. 2:08-cv-1077, 2009 U.S. Dist. LEXIS 92890 (S.D. Ohio Sept. 18, 2009), *aff’d*, 629 F.3d 527 (6th Cir. 2010); *State ex rel. Stokes v. Brunner*, 898 N.E.2d 23 (Ohio 2008); *League of Women Voters of Ohio v. Brunner*, 548 F.3d 463 (6th Cir. 2008) (affirming in part and reversing in part a series of lower court decisions). This last case caused Secretary Brunner to enter into a settlement with the League of Women Voters that resulted in a massive overhaul of poll worker training in the state of Ohio. See Advisory from Secretary of State Jennifer Brunner to All County Boards of Elections, *supra* note 72 (describing the settlement).

¹⁰² See *State ex rel. Painter v. Brunner*, 941 N.E.2d 782, 787 (Ohio 2011) (“The board’s final count indicated that Williams had won the election by 23 votes.”).

¹⁰³ See *id.* (referring to the twenty-five ballots).

¹⁰⁴ See *id.* (referring to the 849 ballots).

votes counted if it was due to poll worker error.¹⁰⁵ The next day, the federal district court issued a preliminary injunction, requiring the Board to begin an investigation into whether the 849 wrong-precinct ballots cast on election day were the result of poll worker error.¹⁰⁶ Then-Secretary of State Jennifer Brunner proceeded to issue directives to facilitate the court-ordered investigation.¹⁰⁷

These directives led Williams' supporters to file a petition in the Ohio Supreme Court on December 20, 2010, challenging Brunner's directives and arguing that all these wrong-precinct ballots should be rejected.¹⁰⁸ They also argued against Hunter's equal protection claim, already pending in federal court. Specifically, they sought to rescind an order from Secretary Brunner, requiring investigation of 849 wrong-precinct ballots.¹⁰⁹

The justices of the Ohio Supreme Court are elected. Although the party affiliations of judicial candidates do not appear on the general election ballot, the nominees are selected through partisan primaries. Ohio Supreme Court justices are, therefore, elected as nominees of their party, even though voters do not necessarily know the judicial candidates' affiliation when they vote in general elections. Republicans enjoyed a 6-1 majority on the Ohio Supreme Court at the time.

Hunter moved to have the U.S. District Court enjoin the Ohio Supreme Court proceedings, but those motions were denied.¹¹⁰ Then things got really interesting. On January 7, 2011, the Ohio Supreme Court agreed with the Williams camp's claim that Ohio law did not require the wrong-precinct ballots to be counted.¹¹¹ The majority concluded that Brunner's directive violated state law—a conclusion that was squarely within its authority—but it went further, asserting that “the United States Constitution ‘leaves the conduct of state

¹⁰⁵ *Hunter v. Hamilton Cnty. Bd. of Elections*, No. 1:10CV820, 2010 WL 4878957 (S.D. Ohio Nov. 22, 2010). To find the filings in this case see Archive of Court Documents, *Hunter v. Hamilton Cnty. Board of Elections*, ELECTION LAW @ MORITZ (last updated Apr. 2, 2012), <http://moritzlaw.osu.edu/electionlaw/litigation/Hunter.php>. To find the filings in the parallel state court litigation, discussed below, see Archive of Court Documents, *State of Ohio ex re. John W. Painter and John Williams v. Jennifer L. Brunner*, ELECTION LAW @ MORITZ (last updated Apr. 2, 2012), <http://moritzlaw.osu.edu/electionlaw/litigation/StateofOhiovBrunner.php>.

¹⁰⁶ See *Hunter*, 2010 WL 4878957, at *5 (ordering the injunction).

¹⁰⁷ See *Hunter v. Hamilton Cnty. Bd. of Elections*, 635 F.3d 219, 227–28 (6th Cir. 2011) (discussing the issuance of the directives).

¹⁰⁸ See *State ex rel. Painter v. Brunner*, 941 N.E.2d 782, 791 (Ohio 2011) (discussing the petition).

¹⁰⁹ See *id.* (discussing the petition).

¹¹⁰ See *Hunter*, 635 F.3d at 224–28 (discussing the denied motions).

¹¹¹ See *Painter*, 941 N.E.2d at 793–94 (“[T]here is no exception to the statutory requirement that provisional ballots be cast in the voter’s correct precinct.”).

elections to the states.”¹¹² The state supreme court claimed to have no obligation to adhere to lower federal court rulings on federal-law questions raised in the case: “[W]e are not bound by rulings on federal statutory or constitutional law made by a federal court other than the United States Supreme Court.”¹¹³ While it did not explicitly rule on Hunter’s equal protection claim, still pending in federal court, it did opine on what the proper remedy would be if there were a constitutional violation, saying that “[a]t best, any equal-protection claim would have merely required the same examination” that was previously conducted for the twenty-seven wrong-precinct early votes.¹¹⁴ Accordingly, the Court ordered that the board perform “exactly the same procedures” as were applied previously—and nothing more—with no presumption of poll worker error.¹¹⁵

The problem with this decision is twofold. First, the Ohio Supreme Court improperly reached out to rule on the proper remedy for an issue of federal law that was then pending before a federal court. This threatened to create a conflict—and arguably did create a conflict, as explained below—between federal and state courts.¹¹⁶ For it was up to the federal court to decide not only whether equal protection had been denied, but also what the proper remedy for any violation should be.¹¹⁷

Second, the Ohio Supreme Court was wrong to assert that it was required to answer only to the U.S. Supreme Court, not to lower federal courts. In fact, the federal courts could, if necessary, effectuate their orders by issuing an injunction against state-court proceedings. This would fall within an exception to the Anti-Injunction Act (“AIA”)¹¹⁸ for federal court orders against state court judges. The AIA generally forbids federal courts from enjoining state court orders, but contains several exceptions, one of which is for injunctions against state courts that are needed “to protect or effectuate [the federal court’s] judgments.”¹¹⁹ The state court itself

¹¹² *Id.* at 793 (quoting *Warf v. Bd. of Elections*, 619 F.3d 553, 559 (6th Cir. 2010)).

¹¹³ *Id.* at 797 (quoting *State v. Burnett*, 755 N.E.2d 857, 862 (Ohio 2001)).

¹¹⁴ *Id.* at 798.

¹¹⁵ *Id.*

¹¹⁶ See Edward B. Foley, *Ohio Provisional Ballot Case: What is Going On?*, ELECTION LAW @ MORITZ (Jan. 14, 2011), <http://moritzlaw.osu.edu/electionlaw/comments/index.php?ID=8055> (noting that the state and federal orders in the *Hunter/Painter* litigation “are in significant tension with each other (to put it mildly)”).

¹¹⁷ See *infra* note 123 and accompanying text (discussing the District Court’s order).

¹¹⁸ 28 U.S.C. § 2283 (2006).

¹¹⁹ *Id.*; cf. Note, *Federal Court Involvement in Redistricting Litigation*, *supra* note 99, at 897–99 (arguing that the AIA will allow federal courts to maintain “the upper hand in redistricting litigation”). While the federal court in *Hunter* did not technically issue a “judgment” prior to the Ohio Supreme Court’s decision, it appears that preliminary injunctions

would enjoy sovereign immunity under the Eleventh Amendment but, under *Ex Parte Young*,¹²⁰ a plaintiff seeking to enjoin a state court order in violation of federal law could name state judges as defendants.¹²¹ Under an amendment to 42 U.S.C. § 1983 that was enacted in 1996, an injunction may not issue against a state judge “unless a declaratory decree was violated or declaratory relief was unavailable.”¹²² So if a state court order conflicts with a federal court order, the proper procedure would apparently be for (1) the federal court to issue a declaratory judgment against the relevant state judges, declaring that the state court order is in conflict with the federal court order and should be withdrawn; and (2) if the state court order is not withdrawn, for the federal court to issue an injunction against the state judges requiring that the order be withdrawn. Fortunately, things have not yet degenerated to this point in Ohio. But the availability of declaratory and injunctive relief against recalcitrant state court judges demonstrates that the Ohio Supreme Court was incorrect to assert that it was not bound to follow rulings of a lower federal court on matters of federal law. If push came to shove, a federal district court would have the power to issue an injunction against state court judges, to enforce its judgment on a matter of federal law.

After the Ohio Supreme Court’s decision, the matter returned to federal district court. Chief Judge Susan Dlott found an equal protection violation and, as a remedy, ordered that 165 ballots be counted and that others be investigated.¹²³ While the Ohio Supreme Court’s prior order is somewhat ambiguous, it appears to conflict with the subsequent federal injunction. Recall that the state court requires that these ballots receive no more than the “same examination” conducted for the twenty-seven wrong-precinct ballots that were initially counted.¹²⁴ The federal district court’s injunction requires something more than the prior state court order permitted. Thus, it was arguably impossible to comply with the federal court order

and orders are considered “judgments” for purposes of the AIA. *See* *TechnoSteel, L.L.C. v. Beers Constr. Co.*, 271 F.3d 151, 155 (4th Cir. 2001) (discussing reviewable decisions); *NBA v. Minn. Prof’l. Basketball, Ltd. P’ship*, 56 F.3d 866, 871 (8th Cir. 1995) (concluding that a preliminary injunction is considered a judgment under the AIA); *Henry v. First Nat’l Bank*, 595 F.2d 291, 306 (5th Cir. 1979) (same); *Doe v. Ceci*, 517 F.2d 1203, 1206–07 (7th Cir. 1975) (same).

¹²⁰ 209 U.S. 123 (1908).

¹²¹ *See, e.g., Pulliam v. Allen*, 466 U.S. 522, 541–42 (1984) (judges do not enjoy immunity from claims for injunctive relief under § 1983).

¹²² ERWIN CHEMERINSKY, *FEDERAL JURISDICTION* 535 (5th ed. 2007).

¹²³ *See* *Hunter v. Hamilton Cnty. Bd. of Elections*, 635 F.3d 219, 230 (6th Cir. 2011) (describing the District Court order).

¹²⁴ *State ex rel. Painter v. Brunner*, 941 N.E.2d 782, 798 (Ohio 2011).

without violating the state court order. But no one seems to have questioned the obligation of local election officials to comply with the federal court order, whether or not it conflicts with a state court order.

The Sixth Circuit upheld most of Judge Dlott's order, though it vacated her decision on the specific number of provisional ballots to be counted and remanded for further proceedings on that question.¹²⁵ The portion of the Sixth Circuit's opinion that has gotten the most attention is its application of *Bush v. Gore* to the counting of some wrong-precinct ballots but not others, concluding that the Board's action violated equal protection.¹²⁶ And this equal protection ruling is certainly important, perhaps "the most significant application of *Bush v. Gore*" to date, as Edward Foley has argued.¹²⁷ But equally significant is what the Sixth Circuit said about the tension—if not outright conflict—between the Ohio Supreme Court and federal district court: "It is not for the state court . . . to resolve . . . equal-protection claim[s] previously filed and still pending in federal court."¹²⁸ This is absolutely right. It was for the federal court to determine not only whether federal law had been violated, but also the proper remedy for a violation of federal law.

This aspect of the federal courts' decisions, however, became the focal point of the en banc petition filed by Hamilton County. That petition began with the assertion that: "The panel has made the district court the final arbiter of whether a particular ballot will be counted—contrary to Ohio law and the functions traditionally performed by state and local officials."¹²⁹ On the next page, it asserts that the decision "intrudes into the power of the states and their handling of federal, state and local elections."¹³⁰ Although the county did not expressly invoke the political question doctrine or advocate a return to the pre-*Baker* understanding of justiciability, that was the functional import of their argument. The response to the en banc petition recognized this, invoking *Baker* for the principle that: "It is well-settled that cases involving alleged violations of the constitutional right to vote are justiciable in federal court."¹³¹

¹²⁵ See *Hunter*, 635 F.3d at 222 (for the court's holding).

¹²⁶ See *id.* at 234–38 (discussing the equal protection issue); see also, e.g., Owen Wolfe, *Is Intent to Discriminate Required in Bush v. Gore Cases?*, ELECTION LAW @ MORITZ (Apr. 13, 2011), http://moritzlaw.osu.edu/electionlaw/docs/110413_wolfe.pdf (discussing the decision's application of *Bush v. Gore*).

¹²⁷ Edward B. Foley, *A Major Ruling on the Meaning of Bush v. Gore*, ELECTION LAW @ MORITZ (Jan. 27, 2011), <http://moritzlaw.osu.edu/electionlaw/comments/index.php?ID=8099>.

¹²⁸ *Hunter*, 635 F.3d at 239–40.

¹²⁹ Petition For Rehearing En Banc of Defendant/Appellant at 1, *Hunter v. Hamilton Cnty. Bd. of Elections*, 635 F.3d 219 (6th Cir. 2011) (No. 1:10-cv-820).

¹³⁰ *Id.* at 2.

¹³¹ Response of Intervenor-Appellee Northeast Ohio Coalition for the Homeless to

The Sixth Circuit rejected the petition for rehearing without a vote, and the Supreme Court denied a stay of the mandate without opinion or dissent.¹³² The matter then returned to the district court, which conducted a trial in the summer 2011. On February 8, 2012, over a year after the federal complaint was filed, Chief Judge Dlott issued a permanent injunction, concluding that the Board denied equal protection in rejecting some provisional ballots that were cast in the wrong precinct due to poll worker error.¹³³ But stay tuned: Hamilton County has appealed.¹³⁴ That appeal is still pending, but the Sixth Circuit has declined to stay Judge Dlott's decision pending the appeal and, following that decision, Tracie Hunter was declared the winner of the election after the previously rejected provisional ballots were counted in compliance with the federal court order.¹³⁵

To be sure, the *Hunter/Painter* chain of events is unusual. Rarely has the tension between federal and state courts been so apparent. But it is quite possible that we will see more such conflicts in the future, given the expanded federal footprint in election administration and the federal courts increased (and in our view laudable) inclination to intervene in this area.¹³⁶ It appears that we are likely to see similar

Appellants' Petitions for En Banc Review at 2, *Hunter v. Hamilton Cnty. Bd. of Elections*, 635 F.3d 219 (6th Cir. 2011) (No. 1:10-cv-820) (citation omitted).

¹³² See *Hamilton Cnty. Bd. of Elections v. Hunter*, 131 S.Ct. 2149 (2011) (for the Supreme Court's denial).

¹³³ *Hunter v. Hamilton Cnty. Bd. of Elections*, No. 1:10CV820, 2012 WL 404786, at *47 (S.D. Ohio Feb. 8, 2012) (for the court's holding).

¹³⁴ The Hamilton County Board of Elections deadlocked on party lines on whether to appeal—predictably, with the two Republican board members voting to appeal and the two Democrats voting not to appeal. The tie was broken by Ohio Secretary of State Jon Husted (a Republican), who voted with the Republican board members. See *Husted Votes to Appeal Ruling in Judge Election*, NEWS5 (Feb. 21, 2012, 5:35 PM), <http://www.wlwt.com/politics/30510450/detail.html> (discussing the decision to appeal).

¹³⁵ See Dan Horn, *Hunter Finally Declared Winner in Judge Election*, CINCINNATI ENQUIRER, April 27, 2012, <http://communitypress.cincinnati.com/article/AB/20120427/NEWS/304270171/Hunter-finally-declared-winner-judge-election?odyssey=nav%7Chead>.

¹³⁶ Even more recent events in Ohio, taking place shortly before this article went to press, provide an example. After their setback in *Hunter*, Ohio Republicans went to *state* court seeking to prevent compliance with a *federal* consent decree pertaining to “right church, wrong pew” provisional ballots. Specifically, Ohio Senate President Tom Niehaus and Speaker Pro Tem Louis Blessing sought a writ of mandamus from the Ohio Supreme Court, which would have prevented Ohio Secretary of State, Jon Husted from complying with the terms of the consent decree in *NEOCH v. Brunner* (now *NEOCH v. Husted*). See Compl. For Writ of Mandamus, *Niehaus v. Husted*, No. 12-0639 (Ohio Apr. 16, 2012), *available at* <http://moritzlaw.osu.edu/electionlaw/litigation/documents/NiehausandBlessing.pdf>. Broadly speaking, the *NEOCH* consent decree requires that provisional ballots cast at the wrong precinct due to poll worker error be counted, so long as they were cast at the correct polling location. Plaintiffs in *NEOCH* then sought an injunction from the federal district court, to prevent the litigants in the mandamus action from proceeding in the Ohio Supreme Court. The *NEOCH* plaintiffs argued that a state court has no authority to restrict individuals from complying from a

conflicts between federal and state court authority over elections in the future in other states as well. And if we do, federal courts do and should hold the trump card. They do because they have the power to enjoin conflicting state court orders, if necessary to effectuate their own judgments. They should because federal judges are insulated from politics in a way that state judges generally are not. Accordingly, they do not have the same conflict of interest to which state judges are subject.

The broader point is that the federal courts' larger role in policing election administration during the past decade is desirable, for similar reasons that the federal courts larger role in redistricting five decades ago was desirable. In both instances, state and local officials could not be trusted, because they were not disinterested actors. The increased federal judicial involvement in election administration is a good thing, because we lack any other institution with a comparable degree of independence from partisan politics.

CONCLUSION

Baker and *Bush* set the stage for greater federal court involvement in the areas of districting and election administration, respectively. In the earlier age, *Luther v. Borden* rejected the notion that federal courts have "the right to determine what political privileges the citizens of a State are entitled to,"¹³⁷ reserving such authority to the states. *Baker* took state sovereignty off the table as a reason for applying the political question doctrine, with respect not only to malapportionment but also to other electoral issues. *Bush's* intervention in state and local vote counting contributed to the increased federal court involvement in overseeing how elections are administered—a role that can increasingly be expected to create tension with state courts, which until recently had primary if not exclusive authority over such

federal court order. They also argued that an injunction against state court proceedings was permissible under the Anti-Injunction Act's exceptions. See *supra* notes, 118–22 and accompanying text. The federal district court issued the requested injunction, and the petitioners in the Ohio Supreme Court case dismissed their suit in order to avoid being held in contempt by Judge Marbley. See Andrew Welsh-Huggins, *GOP Chiefs Bow to Judge, Withdraw Ballot Lawsuit*, THE COLUMBUS DISPATCH, May 12, 2012, <http://www.dispatch.com/content/stories/local/2012/05/12/gop-chiefs-bow-to-judge-withdraw-ballot-lawsuit.html>. Had the state court litigation been allowed to proceed, it could have led to an even more serious conflict between federal and state courts than the one in the *Hunter-Painter* litigation. For a more thorough description of the issues raised by the *Niehaus* petition, see Owen Wolfe, *Provisional Ballots, Consent Decrees, and the Balance Between the Federal and State Governments*, ELECTION LAW @ MORITZ, Apr. 26, 2012, <http://moritzlaw.osu.edu/electionlaw/comments/index.php?ID=9163>

¹³⁷ *Luther v. Borden*, 48 U.S. 1, 41 (1849).

matters. To this date, the *Hunter/Painter* litigation is the most prominent example of such tension in the post-*Bush* era.

The greater federal court footprint in election administration, embodied in *Hunter*, may trouble those who think that this area should remain a matter of state law and local practice. There is no small irony in the fact that the Supreme Court justices most closely associated with a respect for state sovereignty paved the way for these developments with their decision to intervene in *Bush v. Gore*. But we think the increased federal court scrutiny of election administration is a salutary development, given the greater insulation that federal judges enjoy from partisan politics, in comparison with most election officials and state court judges.

It remains to be seen whether the Supreme Court will pull back on the reins but, so far, it does not seem eager to revisit this area. As long as that remains the case, we can expect to see an increasing federal judicial footprint in election administration. This may lead to greater tension with state courts, as well as state and local election officials. But from our perspective, that is a healthy tension.